

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

<hr/>		X	
WILLIAM McMICHAEL,		:	
36 Moores Lane, South		:	Case No.
Newport News, VA 23606,		:	
	Plaintiff,	:	
		:	
		:	<u>COMPLAINT</u>
	v.	:	
		:	
		:	
UNITED STATES DEPARTMENT OF DEFENSE,		:	
1600 Defense Pentagon		:	
Washington, D.C. 20301-1600,		:	
		:	
	Defendant.	:	
<hr/>		X	

Plaintiff William (“Bill”) McMichael, by his undersigned attorney, alleges for his Complaint:

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), to order the production of agency records and information improperly withheld by Defendant in response to three FOIA requests properly made by Plaintiff.
2. The United States Department of Defense (the “DOD”), an executive agency of the United States government, oversees the U.S. Strategic Command (“StratCom”). StratCom is a unified military command consisting of forces from all four branches of the military. Within StratCom, the Office of the Inspector General (“StratCom IG”) manages the internal complaint resolution process.
3. Through this action, Mr. McMichael seeks to compel the DOD to release a report of a StratCom IG investigation of an allegedly abusive command climate created by Captain William Power, the former head of the Directorate of Logistics within StratCom.

4. In addition, Mr. McMichael seeks the receipts of payment for transcription services used during the StratCom IG investigation.

5. Despite timely requests under FOIA by Mr. McMichael, the DOD has failed to release the StratCom IG investigation report or provide a legal basis for withholding it. The DOD has also failed to release, or to provide a legal basis for withholding, the receipts of payment for transcription services used during the investigation.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

7. Venue is premised on the place of business of Defendant and is proper in this district under 5 U.S.C. § 552(a)(4)(B).

8. Mr. McMichael has exhausted all administrative remedies in respect to his FOIA requests pursuant to 5 U.S.C. § 552(a)(4)(B).

PARTIES

9. Plaintiff Bill McMichael is a reporter for the *Navy Times*. The *Navy Times* is an independent journalistic organization that reports on important issues for the military community. The *Navy Times* is headquartered at Gannett Government Media, 6883 Commercial Drive, Springfield, Virginia 22159-0500. Mr. McMichael primarily works from 36 Moores Lane South, Newport News, VA 23606.

10. Defendant DOD is an agency of the federal government that has possession and control of the records that Mr. McMichael seeks. StratCom is a unified combatant command within the DOD. The DOD is headquartered at 1000 Defense Pentagon, Washington, DC 20301.

FACTS

11. In August of 2008, Navy Captain William Power became the Director of Logistics (J-4) at StratCom.

12. The Director of Logistics is responsible for planning, coordinating, and executing logistics functions of supply, mobility, maintenance, engineering, sustainment, and munitions management in support of command missions.

13. In his Director position, Captain Power took on responsibilities commensurate with those of a commanding officer, overseeing all logistics and supply of StratCom.

14. On information and belief, on August 24, 2009, one of Captain Power's subordinates filed a complaint with the StratCom IG concerning an allegedly abusive command climate created by Captain Power.

15. On information and belief, on March 17, 2010, a different subordinate filed another complaint with the StratCom IG, listing nine allegations of violations of the Uniform Code of Military Justice, United States Navy Regulations, StratCom policies, and combatant commander guidance.

16. On information and belief, an eight-month StratCom IG investigation followed, producing hundreds of hours of testimony and approximately 1000 pages of documents. The length of the report was such that the StratCom issued the StratCom IG an additional \$6000 for transcription services.

17. On March 27, 2011, Mr. McMichael filed a FOIA request ("Request No. 1") for a copy of the StratCom IG investigation report. A true and correct copy of Request No. 1 is attached hereto as Exhibit A.

18. On April 4, 2011, Request No. 1 was denied. StratCom issued a *Glomar* response, neither confirming nor denying the existence of the report, and justified the response under Exemption 7(C), citing privacy concerns. A true and correct copy of StratCom's denial of Request No.1 is attached hereto as Exhibit B.

19. On April 11, 2011, Mr. McMichael filed an appeal of StratCom's response to Request No. 1 ("Appeal No. 1"). At the same time, Mr. McMichael filed two additional FOIA requests, one for the StratCom IG investigation report but without mentioning Captain Power by name ("Request No. 2") and another for the receipts of payment for the transcription services used during the StratCom investigation ("Request No. 3"). True and correct copies of Request No. 2 and Request No. 3 are attached hereto as Exhibits C, and D, respectively.

20. On May 13, 2011, the DOD rejected Appeal No. 1, affirming StratCom's original response to Request No. 1. A true and correct copy of DOD's denial of Appeal No. 1 is attached hereto as Exhibit E.

21. On May 23, 2011, StratCom denied Requests Nos. 2 and 3, again issuing *Glomar* responses under Exemption 7(C) to both. True and correct copies of StratCom's denials of Requests Nos. 2 and 3 are attached hereto as Exhibits F and G, respectively.

22. On May 24, 2011, Mr. McMichael filed appeals to the denials of Requests Nos. 2 and 3 ("Appeals Nos. 2 and 3").

23. On July 12, 2011, the DOD rejected Appeals Nos. 2 and 3, affirming StratCom's original responses to Requests Nos. 2 and 3. True and correct copies of DOD's denial of Appeals Nos. 2 and 3 are attached hereto as Exhibits H and I, respectively.

COUNT 1

24. Mr. McMichael repeats, realleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

25. The DOD is an agency subject to FOIA, 5 U.S.C. § 552(f), and must therefore release in response to a FOIA request any disclosable records in its possession at the time of the request and provide a lawful reason for withholding any materials as to which it is claiming an exemption.

26. Exemption 7(C) of FOIA, 5 U.S.C. § 552(b)(7)(C), applies only to information that, if disclosed, “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”

27. The DOD has no lawful basis under FOIA Exemption 7(C) or any other exemption for refusing to confirm or deny the existence of a StratCom IG investigation report concerning an allegedly abusive command climate created by Captain Power.

28. If the requested report does exist, the DOD has no lawful basis under FOIA Exemption 7(C) or any other exemption for failing to disclose the report.

29. The DOD’s failure to confirm or deny the existence of the requested report, and to disclose it if it does exist, violates FOIA.

30. Mr. McMichael is entitled to an order compelling the DOD to confirm the existence of the investigation report and to produce the report if it does exist.

COUNT 2

31. Mr. McMichael repeats, realleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

32. The DOD is an agency subject to FOIA, 5 U.S.C. § 552(f), and must therefore release in response to a FOIA request any disclosable records in its possession at the time of the request and provide a lawful reason for withholding any materials as to which it is claiming an exemption.

33. Exemption 7(C) of FOIA, 5 U.S.C. § 552(b)(7)(C), applies only to information that, if disclosed, “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”

34. The DOD has no lawful basis under FOIA Exemption 7(C) or any other exemption for refusing to confirm or deny the existence of receipts of payment for transcription services used in compiling a StratCom IG investigation report concerning an allegedly abusive command climate created by Captain Power.

35. If the requested receipts do exist, the DOD has no lawful basis under FOIA Exemption 7(C) or any other exemption for failing to disclose them.

36. The DOD’s failure to confirm or deny the existence of the requested receipts, and to disclose them if they do exist, violates FOIA.

37. Mr. McMichael is entitled to an order compelling the DOD to confirm the existence of the receipts of payment for transcription services used in compiling the StratCom investigation report and to produce the receipts if they do exist.

REQUESTED RELIEF

WHEREFORE, Mr. McMichael respectfully requests that this Court:

- a. Declare that the documents sought by Requests Nos. 1, 2, and 3, as described in the foregoing paragraphs, are public records under 5 U.S.C. § 552 and must be disclosed;

- b. Order the DOD to confirm or deny the existence of those documents and, if they do exist, to provide those documents to Mr. McMichael within 20 business days of the Court's order;
- c. Award Mr. McMichael the costs of this proceeding, including reasonable attorney's fees, as expressly permitted by FOIA; and
- d. Grant Mr. McMichael such other and further relief as this Court deems just and proper.

Dated: November 29, 2011

Respectfully Submitted,



Lee Levine (D.C. Bar No. 343095)
Chad R. Bowman (D.C. Bar No. 484150)
LEVINE SULLIVAN KOCH & SCHULZ, LLP¹
1050 17th Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 508-1100 (office)
(202) 861-9888 (fax)

Attorney for Plaintiff

¹ This complaint was prepared, under the supervision of counsel of record, by Jennifer Bishop, Michael Knobler, and James Shih, law students in Yale Law School's Media Freedom and Information Access Clinic.

Exhibit A



March 27, 2011

William H. McMichael
Navy Times
Hampton Roads Bureau
36 Moores Lane South
Newport News, Va. 23606

USSTRATCOM/J011 (FOIA)
901 SAC Blvd., Suite 1A6
Offutt AFB, NE 68113

FOIA REQUEST

Dear FOI Officer:

Pursuant to the federal Freedom of Information Act, 5 U.S.C. s. 552, I request access to and a copy of the U.S. Strategic Command Inspector General investigation into a complaint of an allegedly abusive command climate within the command's J4 created by Capt. William Powers from October 2008 to March 2010.

This information is being sought on behalf of Navy Times for dissemination to the general public. I am gathering this information because of public interest in the nature of military operations.

Documents in digital form are acceptable and preferable, as are any associated photographs, video and any multimedia content. These can be sent directly to bmc michael@navytimes.com. However, if only a hard copy is available, I agree to pay reasonable duplication fees for the processing of this request in an amount not to exceed \$25. As a representative of the news media I am only required to pay for the direct cost of duplication after the first 100 pages. Please notify me prior to your incurring any expenses in excess of that amount, as well as your estimate for those expenses.

However, I ask that you please waive any applicable fees. Release of the information is in the public interest because it will contribute significantly to public understanding of government operations and activities.

The FOI Act, as amended in 1986, provides for a waiver or reduction of fees if disclosure could be considered "primarily benefiting the general public."

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all segregable portions of otherwise exempt material, such as the description of an individual's complaint that deletes the name of the complainant. I reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

As I am making this request as a journalist and this information is of timely value, I would appreciate your communicating with me by telephone or e-mail, rather than by mail, if you have questions regarding this request.

I look forward to your reply within 20 business days, as the statute requires. This request is being sent by e-mail on 03.27.11.

Thank you for your assistance.

Very truly yours,

William H. McMichael

bmc michael@navytimes.com
757-596-6286

Exhibit B



DEPARTMENT OF DEFENSE
UNITED STATES STRATEGIC COMMAND

Reply To:
USSTRATCOM/J0CD
901 SAC BLVD STE 2A3
OFFUTT AFB NE 68113

4 Apr 11
SM# 2014-11

Mr. William H. McMichael
Navy Times
Hampton Roads Bureau
36 Moores Lane South
Newport News VA 23606

Dear Mr. McMichael

This is in response to your Freedom of Information Act (FOIA) request, dated 27 March 2011.

It has been determined that the fact of the existence or non-existence of records concerning the matters relating to those set forth in your request would reveal personally private information. Therefore, pursuant to 5 U.S.C. § 552 (b)(7)(C), I am denying your request. By this statement, USSTRATCOM neither confirms nor denies that such records may or may not exist.

If you are not satisfied with this "partial records" response, you may appeal to the appellate authority, the Director of Administration and Management, Office of the Secretary of Defense. To submit your appeal, you should write directly to the Defense Freedom of Information Policy Office, Attn: Mr. Jim Hogan, 1155 Defense Pentagon, Washington, D.C. 20301-1155. Your appeal should be postmarked within 30 calendar days of the date of this letter, should cite to USSTRATCOM FOIA case number 11-043, and should be clearly marked "Freedom of Information Act Appeal."

There are no fees associated with this request.

Sincerely

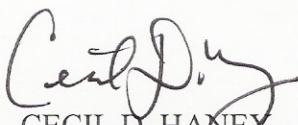

CECIL D. HANEY
Vice Admiral, USN
Deputy Commander

Exhibit C



April 11, 2011

William H. McMichael
Navy Times
Hampton Roads Bureau
36 Moores Lane South
Newport News, Va. 23606

USSTRATCOM/J011 (FOIA)
901 SAC Blvd., Suite 1A6
Offutt AFB, NE 68113

FOIA REQUEST

Dear FOI Officer:

Pursuant to the federal Freedom of Information Act, 5 U.S.C. s. 552, I request access to and a copy of the U.S. Strategic Command Inspector General investigation into a complaint of an abusive command climate in the command's J4 from October 2008 to March 2010.

This information is being sought on behalf of Navy Times for dissemination to the general public. I am gathering this information because of public interest in the nature of military operations.

Documents in digital form are acceptable and preferable, as are any associated photographs, video and any multimedia content. These can be sent directly to bmc michael@navytimes.com. However, if only a hard copy is available, I agree to pay reasonable duplication fees for the processing of this request in an amount not to exceed \$25. As a representative of the news media I am only required to pay for the direct cost of duplication after the first 100 pages. Please notify me prior to your incurring any expenses in excess of that amount, as well as your estimate for those expenses.

However, I ask that you please waive any applicable fees. Release of the information is in the public interest because it will contribute significantly to public understanding of government operations and activities.

The FOI Act, as amended in 1986, provides for a waiver or reduction of fees if disclosure could be considered "primarily benefiting the general public."

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all segregable portions of otherwise exempt material, such as the description of an individual's complaint that deletes the name of the complainant. I reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

As I am making this request as a journalist and this information is of timely value, I would appreciate your communicating with me by telephone or e-mail, rather than by mail, if you have questions regarding this request.

I look forward to your reply within 20 business days, as the statute requires. This request is being sent by e-mail on 04.11.11.

Thank you for your assistance.

Very truly yours,

William H. McMichael

bmmichael@navytimes.com
757-596-6286

Exhibit D



April 11, 2011

William H. McMichael
Navy Times
Hampton Roads Bureau
36 Moores Lane South
Newport News, Va. 23606

USSTRATCOM/J011 (FOIA)
901 SAC Blvd., Suite 1A6
Offutt AFB, NE 68113

FOIA REQUEST

Dear FOI Officer:

Pursuant to the federal Freedom of Information Act, 5 U.S.C. s. 552, I request access to and a copy of the record of payment or payments made to an unknown private firm for the transcription of interviews made during a U.S. Strategic Command Inspector General investigation into a complaint of an abusive command climate in the command's J4 from October 2008 to March 2010. Such expenditures are not classified and are a matter of public record. Please include all relevant information including the amount or amounts of such payments; the dates the payments were made; the specific reason for each payment, such as the number of hours of transcription each payment covered; and for what specific purpose the were made.

This information is being sought on behalf of Navy Times for dissemination to the general public. I am gathering this information because of public interest in the nature of military operations.

Documents in digital form are acceptable and preferable, as are any associated photographs, video and any multimedia content. These can be sent directly to bmc michael@navytimes.com. However, if only a hard copy is available, I agree to pay reasonable duplication fees for the processing of this request in an amount not to exceed \$25. As a representative of the news media I am only required to pay for the direct cost of duplication after the first 100 pages. Please notify me prior to your incurring any expenses in excess of that amount, as well as your estimate for those expenses.

However, I ask that you please waive any applicable fees. Release of the information is in the public interest because it will contribute significantly to public understanding of government operations and activities.

The FOI Act, as amended in 1986, provides for a waiver or reduction of fees if disclosure could be considered "primarily benefiting the general public."

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all segregable portions of otherwise exempt material, such as the description of an individual's complaint that deletes the name of the complainant. I reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

As I am making this request as a journalist and this information is of timely value, I would appreciate your communicating with me by telephone or e-mail, rather than by mail, if you have questions regarding this request.

I look forward to your reply within 20 business days, as the statute requires. This request is being sent by e-mail on 04.11.11.

Thank you for your assistance.

Very truly yours,

William H. McMichael

bmmichael@navytimes.com
757-596-6286

Exhibit E



OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950

MAY 13 2011

ADMINISTRATION AND
MANAGEMENT

Ref: 11-AC-0033

Mr. William H. McMichael
Navy Times
Hampton Roads Bureau
36 Moores Lane South
Newport News, VA 23606

Dear Mr. McMichael:

This responds to your April 11, 2011, Freedom of Information Act appeal.

I have reviewed this matter at the appellate level, and after careful consideration of your appeal, am affirming the initial determination that the fact of the existence or nonexistence of records responsive to your request could reasonably be expected to constitute an unwarranted invasion of the personal privacy of third parties. Consequently, this information is exempt from release pursuant to 5 U.S.C. § 552 (b)(7)(C). Therefore with this response, I can neither confirm nor deny the existence or nonexistence of records responsive to your request.

You have the right to judicial review of this decision in a United States District Court, in accordance with 5 U.S.C. § 552(a)(4)(B).

Sincerely,

A handwritten signature in black ink, reading "William E. Brazis", is positioned above the typed name.

William E. Brazis
Deputy Director

Exhibit F



DEPARTMENT OF DEFENSE
UNITED STATES STRATEGIC COMMAND

Reply To:
USSTRATCOM/J0CD
901 SAC BLVD STE 2A3
OFFUTT AFB NE 68113

23 May 11
SM# 2019-11

Mr. William H. McMichael
Navy Times
Hampton Roads Bureau
36 Moores Lane South
Newport News VA 23606

Dear Mr. McMichael

This is in response to your Freedom of Information Act (FOIA) request, dated 11 April 2011.

It has been determined that the fact of the existence or non-existence of records concerning the matters relating to those set forth in your request would reveal personally private information. Therefore, pursuant to 5 U.S.C. § 552 (b)(7)(C), I am denying your request. By this statement, USSTRATCOM neither confirms nor denies that such records may or may not exist.

If you are not satisfied with this "no records" response, you may appeal to the appellate authority, the Director of Administration and Management, Office of the Secretary of Defense. To submit your appeal, you should write directly to the Defense Freedom of Information Policy Office, Attn: Mr. Jim Hogan, 1155 Defense Pentagon, Washington, D.C. 20301-1155. Your appeal should be postmarked within 30 calendar days of the date of this letter, should cite to USSTRATCOM FOIA case number 11-045, and should be clearly marked "Freedom of Information Act Appeal."

There are no fees associated with this request.

Sincerely



CECIL D. HANEY
Vice Admiral, USN
Deputy Commander

Exhibit G



DEPARTMENT OF DEFENSE
UNITED STATES STRATEGIC COMMAND

Reply To:
USSTRATCOM/J0CD
901 SAC BLVD STE 2A3
OFFUTT AFB NE 68113

23 May 11
SM# 2020-11

Mr. William H. McMichael
Navy Times
Hampton Roads Bureau
36 Moores Lane South
Newport News VA 23606

Dear Mr. McMichael

This is in response to your Freedom of Information Act (FOIA) request, dated 11 April 2011.

It has been determined that the fact of the existence or non-existence of records concerning the matters relating to those set forth in your request would reveal personally private information. Therefore, pursuant to 5 U.S.C. § 552 (b)(7)(C), I am denying your request. By this statement, USSTRATCOM neither confirms nor denies that such records may or may not exist.

If you are not satisfied with this "no records" response, you may appeal to the appellate authority, the Director of Administration and Management, Office of the Secretary of Defense. To submit your appeal, you should write directly to the Defense Freedom of Information Policy Office, Attn: Mr. Jim Hogan, 1155 Defense Pentagon, Washington, D.C. 20301-1155. Your appeal should be postmarked within 30 calendar days of the date of this letter, should cite to USSTRATCOM FOIA case number 11-046, and should be clearly marked "Freedom of Information Act Appeal."

There are no fees associated with this request.

Sincerely


CECIL D. HANEY
Vice Admiral, USN
Deputy Commander

Exhibit H



OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950

ADMINISTRATION AND
MANAGEMENT

Ref: 11-AC-004

Mr. William H. McMichael
Navy Times
Hampton Roads Bureau
36 Moores Lane South
Newport News, VA 23606

JUL 12 2011

Dear Mr. McMichael:

This responds to your May 24, 2011, Freedom of Information Act appeal.

I have reviewed this matter at the appellate level, and after careful consideration of your appeal, am affirming the initial determination that the fact of the existence or nonexistence of records responsive to your request could reasonably be expected to constitute an unwarranted invasion of the personal privacy of third parties. Consequently, this information is exempt from release pursuant to 5 U.S.C. § 552 (b)(7)(C). With this response, I can neither confirm nor deny the existence or nonexistence of records responsive to your request.

You have the right to judicial review of this decision in a United States District Court, in accordance with 5 U.S.C. § 552(a)(4)(B).

Sincerely,

A handwritten signature in dark ink, appearing to read "W.E. Brazis", is written over the typed name.

William E. Brazis
Deputy Director

Exhibit I



OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950

ADMINISTRATION AND
MANAGEMENT

Ref: 11-AC-0041

Mr. William H. McMichael
Navy Times
Hampton Roads Bureau
36 Moores Lane South
Newport News, VA 23606

JUL 12 2011

Dear Mr. McMichael:

This responds to your May 24, 2011, Freedom of Information Act appeal.

I have reviewed this matter at the appellate level, and after careful consideration of your appeal, am affirming the initial determination that the fact of the existence or nonexistence of records responsive to your request could reasonably be expected to constitute an unwarranted invasion of the personal privacy of third parties. Consequently, this information is exempt from release pursuant to 5 U.S.C. § 552 (b)(7)(C). With this response, I can neither confirm nor deny the existence or nonexistence of records responsive to your request.

You have the right to judicial review of this decision in a United States District Court, in accordance with 5 U.S.C. § 552(a)(4)(B).

Sincerely,

A handwritten signature in dark ink, appearing to read "W.E. Brazis", is written over a horizontal line.

William E. Brazis
Deputy Director